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In The

Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by 45 California cities ("the cities"), submit this brief in support of the petition for a writ of certiorari. This case involves a challenge based on the Takings Clause of the Fifth Amendment to the right of democratically elected legislatures to establish economic and social policy. Seeking to reduce retail gasoline prices, the State Legislature of Hawaii limited the rent oil companies may charge dealer/lessees to use oil company-owned service stations. The Ninth Circuit Court of Appeals found that federal courts have the power to strike down such statutes as "takings" where the court determines, based on its own weighing of evidence presented in court, that the regulation will not be effective.

Each of the amici cities is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision in this case. Because the Ninth Circuit's transfer of power to formulate social and economic policy from legislatures to the courts could have pervasive implications for local regulatory authority under the police power, this Court should consider the cities' viewpoint.

INTRODUCTION

At issue in this case is which branch of government determines land use policy: elected legislatures or courts. Language in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) has led to this controversy. In that case, the Court held that courts are empowered to find that a regulation effects a "taking" of property under the Takings Clause of

the Fifth Amendment if the regulation fails to "substantially advance legitimate state interests." *Id.* at 260. This Court has provided reasonably clear signals as to the meaning of this phrase. Nevertheless, numerous lower court decisions show substantial disagreement as to the scope of judicial review under the "substantially advances" standard. This case presents an ideal opportunity for the Court to settle the meaning of this test and provide guidance to the lower courts and government agencies at every level engaged in the regulation of land use.

In the two decades since *Agins*, this Court and the lower federal and state courts have interpreted the "substantially advances" takings test to require either: (1) deferential judicial review of land use regulations of other branches of government – a test akin to "rational basis"; or (2) nondeferential review – known as "heightened scrutiny." The nondeferential standard of judicial review arises from this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that the judiciary may subject exactions of physical interests in land imposed on individual permit applications to "heightened scrutiny." However, as this Court recognized in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999): "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. . . . "

Nevertheless, in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), the Ninth Circuit went beyond administratively imposed exactions to apply nondeferential review to rent control legislation. The Ninth Circuit

opinion conflicts with the interpretation of the "substantially advances" standard by the other circuit courts. The decision allows the federal court to discard any notion of deference to the decisions of a legislative body as to the efficacy of land use regulation. Accordingly, the Ninth Circuit has expanded judicial power to second-guess the decisions of legislatures far beyond any limits imposed by the Constitution. Under *Chevron*, courts would become legislatures, substituting their judgment as to wise and effective land use policy for the decisions of elected representatives. This frontal assault on representative democracy and the Separation of Powers warrants review by this Court.

STATEMENT OF THE CASE

In response to escalating retail gasoline prices, in 1997 the State of Hawaii adopted Act 257 ("Act"). The Act limits rents that oil companies may charge their retail gas station dealer/lessees for company-owned stations to 15% of the dealer's gross profit from gasoline sales. App. 3.[1] The Act allows a dealer to transfer its leasehold interest in the station to another dealer. According to plaintiff Chevron, the Act creates the possibility that the dealer assuming the lease would pay a premium to the assigning dealer for the opportunity to lease the station at a below-market rent. App. 4.

Chevron challenged the Act as a regulatory taking on the ground that the Act does not "substantially advance a legitimate state interest." Applying heightened scrutiny to the Act, the district court entered summary judgment

[1] Citations to the decision of the Ninth Circuit are to the Appendix to the Petition for a Writ of Certiorari.

for Chevron on its takings claim. App. 5. The district court found that the Act would not "substantially advances" the objective of reducing retail gasoline prices because dealer/lessees would retain a "premium" from assigning their leases, rather than pass on reduced rents to consumers in the form of lower prices. App. 59, 66.

In a two to one decision, the Ninth Circuit concluded that the district court correctly held that heightened scrutiny applied and would allow the court to inquire into the efficacy of the Act. However, the two-judge majority found that whether the Act substantially advanced a legitimate state interest raised triable issues of fact. The Ninth Circuit's description of the issues to be "tried" in the district court on remand illustrates the extent to which the court assumed legislative powers:

> The conflicting affidavits establish that genuine issues of fact remain as to whether Act 257 will result in lower gasoline prices. Whether, and to what extent, Chevron will raise its wholesale price of fuel to compensate for lost rent, and whether, and to what extent, incumbent dealers will capture the value of the capped rent in the form of a premium upon transfer of the leasehold, remain as unanswered questions.

App. 17. The majority ordered the district court to hold an evidentiary proceeding essentially aimed at predicting whether the Act would serve its intended purpose to reduce retail gasoline prices. App. 20.

Judge William Fletcher concurred in the judgment to reverse the summary judgment for Chevron, but dissented on the instructions to the lower court on remand. App. 28, 37-38. Judge Fletcher concluded that the proper standard of review of the Act under the Takings Clause was not whether the statute "substantially advances a legitimate state interest," but rather whether there is any "reasonable" basis for the legislative judgment. App. 35.

Judge Fletcher went on to find that the Act can be held to constitute a taking only if it has been established with certainty that the law would result in the tenant capturing a premium. Otherwise, Judge Fletcher wrote, a more deferential reasonableness test should apply. App. 28, 37-38, 40.[2] He punctuated his concurring opinion with a warning that the majority was inviting a return to *Lochnerian* substantive due process:

> The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls.

App. 41.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. REVIEW BY THIS COURT IS NECESSARY TO ESTABLISH A CLEAR STANDARD OF JUDICIAL REVIEW OF LEGISLATIVE LAND USE REGULATION.

The degree of judicial deference to legislative enactments has fluctuated over time. Between 1897 and 1936, the Court embraced a *laissez faire* economic philosophy, explicitly holding that the Substantive Due Process Clause limited the government's power to secure the

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[2] While Judge Fletcher's views as to the proper standard of judicial review conform more closely to the decisions of this Court than the majority's, even Judge Fletcher's "reasonableness" test departs from the proper standard; namely, the rational basis test. *See* footnote 4, *infra*.

general health, safety, and welfare to those regulations (the "means") that bore a substantial relation to a valid public purpose (the "ends"). *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 661 (1887). In the most extreme application of *laissez faire*, *Lochner v. New York*, 198 U.S. 45 (1905) struck down a state law designed to safeguard the health of bakers by limiting their working hours. In *Lochner*, the Court freely exercised its own judgment as to the appropriate policy for the health of bakers. *See id.* at 56-57. Justice Oliver Wendell Holmes' dissent in *Lochner* laid the foundation for the eventual repudiation of *Lochner's* free-market philosophy: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire. . . . " *Id.* at 75.

Beginning in 1934 and continuing for more than 50 years, the Court abandoned substantive due process.[3] In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court embraced the deferential standard of judicial review of economic and social legislation:

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[3] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose."); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours."); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 (1991) ("[D]etermination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [*Parker v. Brown*, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries.").

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . .

Id. at 152.

Since the demise of *Lochnerian* substantive due process, this Court has generally reviewed land use regulation under the Due Process Clause applying the deferential "rational basis" test.[4] Under that test, the court must uphold the regulation unless no reason can be conceived to support it. *Id.* The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Id.*

In *Agins*, however, in 1980, this Court set the stage for a potentially different standard of judicial review of land use regulation. In that case, the Court reintroduced a means-ends test for land use regulation under the Takings Clause. The Court held that the application of a zoning law to property effects a taking if the law "does not substantially advance legitimate state interests." 447 U.S. at 260. Since 1980, two different standards of judicial review applicable to land use regulation have evolved under the "substantially advance" prong of the *Agins* test.

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[4] *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 11-12, 14 (1988) (proper standard of judicial review of legislative rent control is deferential); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 511 n. 3 (1987) (Rehnquist, C.J., dissenting) ("[O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Nondeferential review of the type employed here by the Ninth Circuit, known as "heightened scrutiny," generally applies to "exactions" imposed on a case-by-case basis – where the government conditions approval on the owner's dedication of land to the public to offset the impact of the proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385. Heightened scrutiny imposes the burden on the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Heightened scrutiny arises from the Court's concern that, in cases of unique, discretionary, adjudicatory exactions imposed on individual applications, the danger exists that the public agency might improperly leverage its police power by requiring an individual property owner to bear more than its share of responsibility for the burdens caused by the development. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385.

The Court has also reasoned that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations discussed in [*Euclid*, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and *Agins*] . . . differ in [that] the conditions imposed [in *Dolan*] were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.").

In contrast, this Court has indicated that a deferential standard continues to apply to legislative land use regulations that are generally applicable because the risk of the use of the police power to exact unconstitutional conditions is not present. *Nollan*, 483 U.S. at 834-35; *see*

also Dolan, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[ ] essentially legislative determinations classifying entire areas of the city") The Court implicitly reasoned that classes of property owners have greater power to influence land use policy in the legislative process and thus require less protection from government overreaching than individual property owners. *See id.* However, the Court has not directly decided whether deferential review applies to legislative land use regulations. Recent decisions of this Court in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998) and *Del Monte Dunes*, 526 U.S. 687, while clearly suggesting that deferential review is appropriate for legislative regulations, nevertheless have left this question open.

Eastern Enterprises involved the constitutionality of the Coal Industry Retiree Health Benefit Act. The Act required coal mining companies to pay money into pension funds for the benefit of their former employees. A four-justice plurality held that the Act worked a taking because it imposed an extreme, retroactive financial burden on the claimant. 524 U.S. at 529-37.

Significantly, a majority of the justices rejected the notion that the "substantially advances" prong of *Agins* enunciated a freestanding takings test outside the *Nollan/Dolan* context of administratively compelled dedications of land. In *Eastern Enterprises*, five justices indicated that the deferential substantive due process test, rather than a takings analysis, should be applied to a law requiring the payment of money. 524 U.S. at 545-46 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). As Justice Kennedy stated, the wisdom of governmental action that does not require the dedication of possessory interests in real property is more appropriately analyzed

under "general due process principles rather than under the Takings Clause." *Id.* at 545 (Kennedy, J., concurring and dissenting); *see also* John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. Law 853, 866-76 (1999); S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 Calif. L. Rev. 1547, 1561-64 (2000).

In *Del Monte Dunes*, this Court observed that it had thus far applied heightened scrutiny only in "the special context of exactions." 526 U.S. at 702. The Court held that heightened scrutiny was not intended to apply to denials of individual development applications. *Id.* at 702-03; *see also id.* at 723 (Scalia, J., concurring), 733 (Souter, J., dissenting, joined by O'Connor, Ginsburg, and Breyer, JJ.). The Court allowed the jury to determine whether the City of Monterey's conduct "substantially advances legitimate public interests" under the Takings Clause only because the city did not object to a jury instruction allowing that question to be put to the jury. *Id.* at 721-22. However, the Court reserved the question of whether means-ends review under the Takings Clause imposes a different standard of review for generally applicable land use regulation than substantive due process imposes on other police power regulations. *Id.* at 722.

The Court also distinguished between issues of fact in individual cases and issues of a "city's general land-use ordinances or policies." In the former case, the Court held that juries may resolve the question applying a nondeferential standard; in the latter case, the Court stated that the inquiry "might well fall within the province of the judge" applying a more deferential standard. *Id.* at 721-22.

In yet a third case addressing the scope of the "substantially advances" test, only two justices of this Court

expressed the view that heightened scrutiny should be expanded to apply to legislation. In *Parking Assn. of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), the Supreme Court of Georgia held that landscaping and curb requirements for development established by a zoning ordinance did not trigger heightened scrutiny because the regulations in question were legislative. This Court denied certiorari. 515 U.S. 1116 (1995). However, Justices Thomas and O'Connor dissented from the denial of certiorari, urging an expansive reading of *Dolan*:

> It is hardly surprising that some courts have applied *Tigard's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking.

Id at 1117-18.[5] The remaining justices did not join in this opinion.

Conflict among the decisions of the circuit courts is grounds for granting certiorari. Supreme Court Rule 10. Despite this Court's clear indication that legislative land use regulations should not receive heightened scrutiny, the lower federal courts and the state courts have issued conflicting decisions as to the scope of heightened scrutiny under *Nollan/Dolan*. The cases addressing the application of the "substantially advances" test to generally applicable regulation occupy the full spectrum from

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[5] The dissenting opinion apparently did not consider the Court's rationale for the adjudicatory-legislative distinction expressed in *Nollan* and *Dolan*; namely, that the danger of the government's unfairly leveraging its police power is far greater in cases of individual property owners seeking approval of a single development than in instances of regulation applying across the board to an entire class of similarly situated property owners. *See Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 385.

highly deferential review to heightened scrutiny. *Compare New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (heightened scrutiny not applicable to zoning regulation); *Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny inapplicable to hunting license scheme because regulation not a "physical taking or its equivalent"); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974-75 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000) (heightened scrutiny does not apply to downzoning); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1001-02 (Cal. 1999), *cert. denied*, 526 U.S. 1131 (deferential standard applies to land use regulations that are "generally applicable through legislative action") *with Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (applying heightened scrutiny to legislative rent control); *Chevron*, 224 F.3d 1030, 1033-34 (same); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (heightened scrutiny applicable to legislative development impact fee); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (same); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (applying heightened scrutiny to rent control legislation).

This Court has not definitively resolved the scope of the "substantially advances" prong of the *Agins* takings test, particularly as it applies to generally applicable land use regulation. The Court should grant review in this case to establish a uniform standard of judicial review of

legislative zoning and other land use regulations under the Takings Clause.[6]

II. THE COURT SHOULD GRANT REVIEW TO PRESERVE THE POWERS OF ELECTED LEGISLATURES TO DECIDE THE WISDOM AND EFFICACY OF LAND USE REGULATION.

Immediate review of the Ninth Circuit's decision is imperative for amici cities. The cities have enacted scores of laws regulating land use to promote the general health, safety, and welfare and continue to enact such regulations daily. The Ninth Circuit decision invites legal challenges to every one of these regulations as a "taking."

The Ninth Circuit's decision allows aggrieved landowners to avoid the political process entirely. If the decision stands, courts could be permitted to assume the role of legislatures, and the public would be denied a voice in matters that have direct and immediate impact on their safety, property values, economic welfare, and quality of life. The framers of the Constitution could not possibly have intended this result.[7] This Court should therefore

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[6] On January 29, 2001, Greenspring Racquet Club filed a petition for certiorari requesting that the Court adjudicate the same issue presented here; namely, the proper standard of judicial review of a generally applicable zoning ordinance under the "substantially advances" prong of the *Agins* test. *Greenspring Racquet Club, Inc. v. Baltimore County, Maryland*, No. 00-1012. In that case, in upholding a zoning ordinance limiting the height and floor-area ratio of buildings against a takings challenge, the Fourth Circuit deferred to the legislature. The filing of the petition in *Greenspring* is further evidence that the scope of the "substantially advances" standard is an important and unsettled issue warranting immediate review by this Court.

[7] The Chevron majority noted that its decision should be narrowly applied and that it "save[s] for another day the

grant the petition and establish a uniform standard of review of the efficacy of land use regulation that preserves traditional deference to the policy decisions of legislative bodies.

A. The Ninth Circuit Decision Conflicts with Representative Democracy.

Whether a price control such as that at issue in *Chevron* will have its intended effect in a complex industry is usually the subject of lengthy legislative committee hearings, in which economists, consumer advocates, dealers, and oil companies would present divergent views on the question. Following the gathering of evidence, democratically elected legislators would weigh the opinions of their constituents affected by the proposed regulation and their respective experts to fashion a policy that will promote the general health, safety, and welfare.

Predicting the impact of a price control in a complex business such as the motor fuel industry is quintessentially a legislative policy function. The courts have no greater right to legislate this policy than they have in dictating zoning decisions, safety requirements for autos, or the proper procedure for pasteurizing milk.

Chevron raises the potential for abuse of judicial power with regard to all government regulation, not merely land use regulation. The deferential rational basis

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question of whether the 'substantially advances' test applies outside the context of rent control statutes that permit the capture of a premium." App. 12 n. 4. However, the court's reasoning that legislatures cannot be entrusted to make policy with respect to the economic relations between commercial landlords and tenants is easily expanded to apply to all social and economic regulation that affects the value of assets, including all land use regulation.

test, historically applicable to social and economic legislation, would become obsolete. The Ninth Circuit's proposal that the federal courts would conduct their own evidentiary hearing to predict the effects of legislation, *see* App. 15-17, takes a page directly from *Lochner*.

B. The Ninth Circuit Decision Will Prevent Land Use Planning and Reduce Property Values.

The prospect of defending every land use policy in court will inevitably have a chilling effect on the entire planning process. Governments will be less apt to experiment with new initiatives to respond to rapidly changing conditions. More social and economic problems will be unaddressed. All communities will become more haphazard, congested, and unsafe. Ultimately, the quality of life for all would suffer. What may promote the short-term economic interest of a few property owners will cause immeasurable injury to a public that relies on local government to create well-planned communities.[8]

For example, San Francisco and amici cities enact regulations designed to reduce traffic congestion and preserve open space. The cities have instituted programs to retain affordable housing for low-income households, the elderly, and the disabled. They limit the location of liquor stores and pornography shops to protect children and reduce crime. The cities regulate the size and design of

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[8] At the same time that land use regulations deny property owners unfettered prerogatives to do what they will with their property, these regulations enhance the quality of communities and make all property more valuable. *See, e.g.*, C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One Sided and Uninformed*, 7 Envtl. L. & Prac. 5 (1999) (documenting the "givings" from broadly applied land use regulation that enhance property values).

buildings and billboards to preserve neighborhood character. These zoning regulations preserve property values and create livable communities in which to work and raise families. All of these programs would be at risk under the Ninth Circuit's nondeferential approach to judicial review of land use legislation.

C. The Ninth Circuit Decision Will Promote Inefficiency and Chaos in Land Use Policymaking.

If courts are to be the final arbiter of land use policy, the enactment of a land use policy by a legislature will mark only the beginning of the decision-making process. The validity of any policy could remain unsettled for years as challenges to the legislation wind their way through the courts. Removing certainty as to the validity of land use regulation will chill investment in projects involving real property.

Moreover, the Ninth Circuit's nondeferential standard of judicial review will flood the courts with lawsuits by property owners, as virtually any zoning regulation would be subject to challenge as a taking. The government could be compelled to defend thousands of land use laws in evidentiary proceedings, at monumental cost to the taxpayers.

Nor do the courts have the institutional competence to study and mediate between competing interests in land use – a function that is the essence of law making. A court confronted with a complex issue of land use planning is no substitute for a local legislative agency that can see the larger picture in the jurisdiction or region. Land uses are interdependent. Effective land use planning requires a broader perspective than one isolated case at one point in time. Indeed, land use regulation is no different than other exercises of the police power that mediate private economic interests and other socially

important goals. Decisions as to the most effective land use policies are best made by legislatures taking the initiative to identify problems, receive evidence from affected parties, debate the advantages of alternative policies, and compromise in order to reach a majority decision. A court with hundreds of cases on its docket is not the proper forum to make land use policy.

D. The Ninth Circuit Decision Will Shift Land Use Planning to Federal Courts Unfamiliar with Local Conditions.

The Ninth Circuit decision will break down the Separation of Powers at both the federal and state levels, but this problem would be particularly acute where federal courts are involved. Federal courts are not equipped to assume the planning function now performed by state and local legislative agencies. Zoning and planning requires the careful weighing of individual property rights against public values within a local context. Federal judges rarely come from the communities in which land use disputes before them arise. Thus, federal courts cannot be expected to develop the thorough appreciation of local conditions and interests necessary to engage in effective land use planning.

For example, there is no comparison between conditions prevailing in urbanized cities like San Francisco and the patterns of development in Silicon Valley or the rural communities of California's Central Valley. Yet, the Ninth Circuit would have federal judges unfamiliar with local conditions dictating land use rules to each of these diverse communities. Federal judicial policymaking simply does not work in the realm of land use. Not surprisingly, with the exception of the Ninth Circuit, federal courts

have wisely declined to usurp the roles of local zoning boards and state courts.[9]

Indeed, the Ninth Circuit decision runs counter to the pronounced trend *away* from federal preemption of state and local regulation. In a series of recent decisions, this Court has restricted the federal role in economic and social regulation, indicating that such matters are within the purview of the state and local governments. For example, in holding that the Army Corps of Engineers has no regulatory authority to protect migratory birds using non-navigable bodies of water, the Court stated:

> [T]he States' [retain] traditional and primary power over land and water use. ("[R]egulation of land use [is] a function traditionally performed by local governments"). . . . Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .

Solid Waste Agency v. United States Army Corps of Engineers, 121 S.Ct. 675, 684 (2001) (citations omitted). In areas such as disability rights, gender discrimination, and gun control, this Court has returned control of functions previously centralized in the federal government to the states.[10]

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[9] *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards' "); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.")

[10] *See, e.g., Board of Trustees of the Univ. of Alabama v. Garrett*, No. 99-1240 (Feb. 21, 2001) (barring recovery by state employees

The ripeness and abstention doctrines constitute additional grounds for reserving land use disputes for resolution by the state courts. These sound policies are designed to preserve the discretion of local legislative agencies and local courts to regulate the use of land. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-95 (1985) (takings claimant must seek compensation in state court under state procedures before a federal takings claim arises); *Railroad Commission v. Pullman*, 312 U.S. 496, 498 (1941) (land use planning is sensitive area of social policy that federal courts should leave to state courts). These doctrines insure that land use disputes involving state and local governments are heard and determined in the state courts under state law in part because local agencies and courts, not federal courts, have the greatest familiarity with local conditions.[11]

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based on state's failure to comply with federal ADA); *United States v. Morrison*, 529 U.S. 598 (2000) (federal law proscribing violence against women inapplicable to state claim of sexual harassment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal regulation of guns in schools).

[11] Although it is settled law in California that heightened scrutiny does not apply to land use legislation, *see Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d at 1001-02 (deferential standard applies to land use regulations that are "generally applicable through legislative action"), the Ninth Circuit decision nevertheless could have an immediate impact on California government agencies. The Ninth Circuit has flouted *Williamson's* state compensation requirement by allowing takings cases to circumvent the state courts. In *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1996) and *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998), the Ninth Circuit held that a facial challenge to regulation on the ground that it does not "substantially advance legitimate state

Here, rent control is a quintessential state and local issue. By adjudicating Chevron's takings claim, the Ninth Circuit has improperly federalized this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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interests" is ripe in federal court even though the claimant has not sought compensation in state court.